SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

1953

No. 23943

SOUTHERN PACIFIC COMPANY,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY CITY OF LOS ANGELES AND CITY OF GLENDALE, REAL PARTIES IN INTEREST

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STATUTE CITED

United States Code, Title 28, Section 1257(2) 3

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S ASSERTION OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM BY CITY OF LOS ANGELES AND CITY OF GLENDALE, REAL PARTIES IN INTEREST.

The City of Los Angeles, a municipal corporation, and the City of Glendale, a municipal corporation, were parties to the proceeding before the California Public Utilities Commission and are obligated by the final decree and judgment which has been appealed from in this proceeding to pay a percentage of the cost of constructing a grade separation. As real parties in interest, the two cities respectfully show the following in opposition to appellant's asser-

tion of the jurisdiction of the Supreme Court of the United States and in support of their motion to dismiss or affirm:

I

Issue on Appeal

Appellant's contention on appeal is that a railroad company's share of the allocated cost of a grade separation must be based upon benefit to the railroad arising from the absence of a crossing at grade at the point involved. Appellant relies upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (1935), 294 U. S. 405. The California Public Utilities Commission held that in the exercise of the police power, "a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion"; citing, *Erie Railroad Company* v. *Board of Public Utility Commissioners* (1920), 254 U. S. 394; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis* (1914), 232 U. S. 430; *Missouri Pacific Railway Company* v. *Omaha* (1914), 235 U. S. 121; and *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners* (1928), 278 U. S. 24.

II

The Validity of a State Statute Is Not Involved in This Appeal

The assignment of errors and statement as to jurisdiction show that appellant's attack is not upon the order of the California Public Utilities Commission authorizing the cities to construct a grade separation. Appellant's attack is confined to the condition therein that the cost of the grade separation be allocated among the City of Glendale, City of Los Angeles, County of Los Angeles and ap-

pellant in the manner stated. That portion of the order under attack by appellant is not legislative in character and is not a statute of the state within the meaning of Section 1257(2) of Title 28 of the United States Code. Instead it is a judicial determination under the organic law of California.

Postal Telegraph-Cable Co. v. *Railroad Commission* (1925) 197 Cal. 426, 435, 438-439; 241 Pac. 81;
City of San Jose v. *Railroad Commission* (1917) 175 Cal. 284, 290-291; 165 Pac. 967;
Pacific Telephone Etc. Co. v. *Eshleman* (1913) 166 Cal. 640, 650; 137 Pac. 1119.

The authorities relied on by appellant do not support its contention that the statute involved in this case is the order of the California Public Utilities Commission. In the first case cited, *Lake Erie & Western Railroad Co.* v. *Public Utilities Commission* (1919), 249 U. S. 422, the appeal by the railroad attacks an order of the Public Utilities Commission requiring it to restore a spur track to a grain elevator, whereas in the case at bar the attack is directed only to the matter of allocating costs. The second case, *Live Oak Water Users' Association* v. *Railroad Commission of California* (1926), 269 U. S. 354, involved an order fixing the rates for service, thereby prescribing a rule relating to future service supplied by the utility. The third case, *Hamilton* v. *Regents of the University of California* (1934), 293 U. S. 245, involved an order of the Regents requiring students to take military training. As stated by the Court, at page 258, speaking through Mr. Justice Butler, "the assailed order prescribes a rule of conduct and applies to all students belonging to the defined class." In the case at bar the order complained of does not have the essential characteristics necessary to meet the requirement of legislative character present in the foregoing cases cited by appellant.

In the language of *Ross* v. *Oregon* (1913), 227 U. S. 150, 163:

> "Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67: 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'"

III

No Substantial Federal Question Is Presented

Appellant's sole reliance is upon *Nashville, Chattanooga & St. Louis Railway* v. *Walters* (*supra*), 294 U. S. 405. While appellant claims that the case is a departure from the earlier decisions of this Court, it is to be noted at the outset that the case cannot be so characterized. For, as stated on page 431, "no case involving like conditions has ever been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state." The grade separation there involved was required in order to provide an underpass for a new Federal-aid highway in a rural community of 1823 inhabitants located in a sparsely settled territory. There was little traffic on the highway. Five of the six trains operated daily each way passed between 10:00 o'clock P.M. and 6:00 o'clock A.M. when there was substantially no highway travel. The new highway and underpass were not for local transporta-

tion needs, but to serve as a link in the nation-wide system of super highways fostered by Congress in conjunction with the several states in the interest of commerce by motor vehicle. The existing grade crossing was not eliminated but remained to serve the local needs on the old street route. The trial court found that, "the decision to build this underpass, its location and construction was not in any proper sense an exercise of the police power," and "did not involve an exercise of the police power any more than many other features of this project such as elimination of curves, grades, widening the pavement, et cetera."

The Tennessee statute involved authorized the State Highway Commission in its discretion to require the elimination of grade crossings in the interest of safety. But the statute, as pointed out by this Court (p. 412), "without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad requires the latter to pay in every case, one-half of the total cost of the separation of grades."

The trial Court held the statutory apportionment of costs unconstitutional under the special facts of the case. On appeal, the Supreme Court of Tennessee, as pointed out at page 414, "declined to consider the special facts relied upon as showing that the order and statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." The United States Supreme Court declined to pass upon the sufficiency of the foregoing facts to sustain appellant's contention that the statute and order based thereon were arbitrary and unreasonable. The holding of this Court in that case was (p. 428):

> "The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the under-

pass. The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it."

The opinion goes on to state that, "state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost." The qualification of this general rule which was possibly applicable to the facts in the *Nashville* case is stated as follows (pp. 430, 431):

"But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. . . . And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

The case at bar does not have any of the aspects which would bring it within the limitation upon the general rule of liability announced in the *Nashville* case. The record before the California Public Utilities Commission clearly shows a factual situation materially different from that which existed in the *Nashville* case. In the Answer and Brief of the City of Los Angeles and the City of Glendale, Real Parties in Interest, in Opposition to Issuance of Writ of Review, the following facts were set forth to supplement the facts contained in the Petition for Writ of Review (pp. 5-7):

"In 1923, when the movement for a grade separation was first started, the traffic on Los Feliz was 16,000 vehicles per day at the grade crossing. [Ex. 2, p. 4.] Traffic counts conducted in 1951 indicated that the traffic load had increased to approximately 27,000 vehicles per day. [Ex. 2, p. 4.] Of the total number of

vehicles passing over the grade crossing, only a very small percentage were trucks and those trucks were engaged principally in local transportation. [Tr. 28, 126.] The buses which used the street were substantially all engaged in local transportation. [Tr. 125.] There was no evidence that vehicles using the street were in competition with the railroad, while there was evidence to the effect that many vehicles using the street were providing business for the railroad. [Tr. 66.] Testimony presented indicated that the public probably would continue to make increasing use of Los Feliz in the future despite construction of freeways in the metropolitan area. [Tr. 185.] Los Feliz is an important traffic artery connecting the Hollywood and West Los Angeles areas with the Glendale, La Crescenta Valley, Pasadena and San Gabriel Valley areas. [Ex. 2, p. 3.]

The present 70 to 76-foot roadway of Los Feliz is being used to approximately 50% of its designed capacity due to obstructions. [Tr. 182, 186, 193.] A point of congestion on Los Feliz at its intersection with Riverside Drive [Tr. 82, 92] will be eliminated with the construction of the Riverside Parkway. [Tr. 113.] Upon removal of other obstructions, by widening Franklin and Western Avenues which connect to Los Feliz and elimination of the grade crossing, use of Los Feliz by motor vehicles will increase. [Tr. 196.]

The number of train movements has materially increased in the last fifteen years [Tr. 71, 107; Ex. 4.] and *the length of freight trains has been drastically increased* during the lives of some of the Railroad's personnel. [Tr. 256.] All passenger trains are either just starting or slowing almost to a halt while passing the Los Feliz grade crossing. [Tr. 67.] Freight trains also operate at reduced speed because they are either slowing up as they approach the Los Angeles yards or they are picking up speed as a result of leaving the yards. [Tr. 67.] With the present volume of traffic, backlash (Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection [Tr. 179.]) occurs

during peak hours as a result of train movements. The backlash occurs both at San Fernando Road when the train is crossing and upon the railroad tracks when eastbound traffic, released after a train movement, is stopped at the intersection of San Fernando Road. [Tr. 188, 189, 190, 191.] In the future when traffic volumes increase on Los Feliz, such backlash will become a common occurrence. [Tr. 197.]"

Unlike the grade separation involved in the *Nashville* case, the Los Feliz grade separation is located on a traffic artery in the midst of a metropolitan area populated by several million people. The grade separation is needed in order to provide for local transportation needs, and after construction it would be used by very few vehicles in competition with the railroad while it would be used by many vehicles bringing business to the railroad. Upon construction of the grade separation, the existing grade crossing would be eliminated and the hazardous conditions now existing at the grade crossing would also be eliminated. If the grade crossing is not eliminated, the hazardous conditions now occurring occasionally will occur regularly as the volume of traffic on Los Feliz increases.

The appellant has contended that there are no safety hazards at the grade crossing and that public safety is not an issue. With that contention we do not agree. As pointed out in the summary of facts set forth, *supra*, vehicles are now occasionally stopped on the grade crossing unable to move forward or backward because of traffic congestion, and the operation of the existing grade crossing gates contributes materially to that traffic congestion. As the volume of traffic flow increases on Los Feliz, this condition is expected to occur regularly. The Public Utilities Commission was aware of this situation and so indicated by an exceedingly brief reference thereto shown on pages 6 and 7, Appendix A, of appellant's statement as to jurisdiction. The backlash which occurs on San Fernando Road and which

is described in the Commission's opinion also occurs on the grade crossing when the traffic held up by the crossing gates is suddenly released and a greater volume of traffic is released than can cross the intersection of San Fernando and Los Feliz during one change of traffic signals.

The vice of appellant's reliance upon the remarks of Mr. Justice Brandeis in the *Nashville* case relative to changed conditions no longer warranting the imposition of costs for grade separations upon the railroad is that those remarks were directed to the Federal-aid highway system and the Federal legislative scheme for the furtherance of this new facility for through transportation. This is a matter wholly foreign to the case at bar. The case at bar comes squarely within the concession referred to in the *Nashville* case (p. 413) that, "the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate"; reference being made in the footnote to sixteen decisions.

The *Nashville* case is not a reconsideration by this Court of the problem of grade separation after a long interval of time elapsing since its prior consideration of the question. In 1931 this Court considered the matter collaterally in affirming judgments of the California Supreme Court affirming an order of the California Railroad Commission requiring the construction of a union passenger station in Los Angeles, it being said in *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission* (1931), 283 U. S. 380, concerning railroads (p. 395):

> "They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads."

The case at bar is an illustration of the true exercise of the police power justifying the exaction of uncompensated obedience by appellant and in no sense involves an improvement for the special benefit of any particular segment of the public of the nature involved in the *Nashville* case. This being so, appellant's persistent claim of arbitrary apportionment of costs not in consonance with benefits finds no support in any decision of this Court, and, in fact, raises no question that is not firmly foreclosed by the prior decisions of this Court.

Conclusion

Upon the foregoing, the City of Glendale and the City of Los Angeles respectfully move that the appeal be dismissed or that the judgment and decree of the Supreme Court of the State of California be affirmed.

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